FILED
DEC 31 1924
WM. R. STANSBURY

No. 422

Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

RESPONDENT'S BRIEF.

TOM DAVIS AND ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

INDEX.

Page.

Statement of the case..... 1
The writ should be dismissed..... 2
Statement of facts..... 3
Undisputed facts 3
Interstate commerce conceded..... 3
Defective draw-bar conceded..... 4
Conductor in charge of train..... 4
The accident—The use of the defective car... 4
Conductor O'Leary in charge of the work... 6
The claimed direction of the decedent, Ring, to his fellow brakeman, Quist..... 12
Summary of facts..... 18
Inaccurate statements in petitioner's brief... 19
Argument, points and authorities..... 22
Specification of error III..... 22
The Federal statute..... 23
Specifications of error I, II and IV..... 32
1. The defect was the proximate cause of Ring's death 35
2. The defect need not be the sole proximate cause, "In whole or in part."..... 44

LIST OF CASES CITED.

Page.

Boldt v. Penn. R. Co., 245 U. S. 441.....24, 29

Beecroft v. Great Northern R. Co., 242 U. S. 18, 61 L. Ed. 530.....51, 55

C. B. & Q. R. Co. v. United States, 220 U. S. 557, 55 L. Ed. 582..... 61

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590..... 31

Davis v. Wolfe, 44 S. C. 64..... 45

Erie R. Co. v. Russell, 183 Fed. 722..... 56

Grand Trunk W. R. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838..... 40

Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. Ed. 322.....30, 35, 39

Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. Ed. 745.....51, 55

Lang v. New York C. R. Co., 255 U. S. 455, 65 L. Ed. 729..... 46

McCalmont v. Penn. R. Co., 273 Fed. 231..... 24

McNaney v. C. R. & P. R. Co., 132 Minn. 391, 157 N. W. 650..... 47

San Antonio & A. P. R. Co., 241 U. S. 476, 60 L. Ed. 1110..... 33

Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 60 L. Ed. 1125..... 47

Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874 52

Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

This case is here upon a writ of certiorari granted by this court to review a judgment of the Supreme Court of Minnesota, which judgment affirmed a judgment of the District Court of Yellow Medicine county, Minnesota, in favor of respondent for damages for the death of Edmund Ludwig Ring, a switchman employed by the petitioner.

The right of recovery was based on the Employers' Liability Law and a violation of the coupler provision of the Safety Appliance Act.

The trial court submitted to the jury the question of whether the defendant violated the Safety Appliance Act and whether such violation contributed in whole or in part as a proximate cause to

the death of decedent.

Upon appeal the Supreme Court of the state of Minnesota affirmed the judgment of the lower court.

Thereafter a petition for a writ of certiorari was filed in this court asking a review of the judgment so entered.

The writ of certiorari was granted by this court. After the granting of the writ of certiorari respondent moved the court to dismiss the writ on the ground that it was *improvidently granted* and for the reason that the court was not advised as to the *true facts* surrounding the injury to and death of the decedent, Ring.

In the alternative, respondent asked that the cause be advanced for hearing to the summary docket.

The motion was submitted on October 6th, 1924, and this court ordered that the cause be placed on the summary docket for hearing, and further ordered that the motion to dismiss be heard and determined upon the argument of the cause upon the merits.

The Writ Should be Dismissed.

The motion to dismiss the writ of certiorari herein should be granted on all of the grounds set forth and contained in the motion to dismiss, and the brief in support thereof which has heretofore been filed in this court.

STATEMENT OF FACTS.

While not wishing to burden the court with repeatedly stating the facts in the case, counsel for respondent feel that in the *interest of accuracy and clarity,* a complete statement of the facts in this case should again be made to this court.

In the petition for the writ of certiorari herein petitioner made many statements, not only inaccurate but wholly unsupported by any facts in the record. Many of these inaccuracies are pointed out in the motion to dismiss.

In the brief of petitioners on the merits there are also a number of statements which, if not wholly inaccurate, are at least of a character very likely to mislead and deceive the court.

Undisputed Facts.

(Figures in parentheses refer to folios of printed transcript of record.)

There is no question but that decedent Ring was employed by the railroad company as a brakeman and that he was injured at Budd, Iowa, on October 4th, 1922.

He survived his injury for a period of approximately fifteen days.

Interstate Commerce Conceded.

There was no dispute but that the train in question was interstate in character, and there was no

claim but that the rights of the parties were governed by the Employers' Liability Law of Congress.

Defective Draw-Bar Conceded.

There was no dispute but that there was a defective draw-bar on one of the cars forming a part of a freight train being operated by the defendant through the station of Budd, Iowa, on October 4th, 1922.

The draw-bar of this car pulled out and it was necessary to chain it to an adjoining car in order to move it. This fact was not disputed.

Conductor in Charge of Train.

The conductor, who had charge of the train in question, was one J. P. O'Leary (27).

There was no question but that the conductor had charge of the train and of the brakeman, Ring, and his fellow brakeman, one Quist (39).

The Accident—The Use of the Defective Car.

On October 4th, 1922, the freight train, in charge of Conductor O'Leary, with Brakemen Ring and Quist, pulled into the station of Budd, Iowa.

The train consisted of about forty cars, most of them being loads (32).

The train stopped at Budd and headed into a side-track to meet an eastbound train.

In starting up again, a draw-bar pulled out (33).

As to what occurred after this draw-bar pulled out, Conductor O'Leary testified:

> "Q. And when you discovered that, what did you do?
>
> A. I sent this brakeman, Ring,—the train stood on the reverse curve at the time,—and I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side-track.
>
> Q. And after that was done?
>
> A. Well, we done that. We backed up and cut the chain on this car and pulled the rear end of the train into the side-track.
>
> Q. And did Ring act under your directions in helping to chain up the draw-bar of this car?
>
> A. Yes, sir.
>
> Q. And then you pulled it up on to the side-track?
>
> A. Yes" (33-35).

The court will note that the train was pulled onto the side-track.

The impression is conveyed by the brief of the petitioner that the defective car had come to a standstill on a dead track and that it was out of use. This is far from the fact, and we again refer to the record.

The conductor, O'Leary, was asked as to what other work remained to be done with the car after the train was gotten to the side-track. It is to be remembered that this car was not singly taken out of the train at this time, and taken to the side-track, but the *entire train moved to the side-track.*

> "Q. After you did that, did you have *any other work* with regard to this draw-bar?

A. Yes. I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

From this testimony it is apparent that *after* the defective car, which was part of the train of forty cars, was on the side-track, it was then to be switched out of the train, the balance of the cars taken and the defective car was to be left on the side-track. Before this could be done it was necessary that the defective car be switched and moved out of the train.

CONDUCTOR O'LEARY IN CHARGE OF THE WORK.

While there is no direct claim made by petitioner that Conductor O'Leary did not have charge of the work in question the impression apparently is sought to be conveyed that the brakeman, Ring, had charge of the work and the direction of the train movement.

The record however clearly shows the conductor to have been in charge of the train and to have directed Ring in the doing of his work.

"Q. And *you were in charge of the train as conductor?*

A. *Yes, sir*" (39).

O'Leary further testified:

"Q. Well, you were conductor of the train?

A. Yes.

Q. *And he was working under you?*

A. *Yes, sir.*

Q. And if he went in there to unhook the chain before you moved the train it would be

your duty to tell him to get out?

A. Yes, sir.

Q. *And he was in there working with you and doing whatever you suggested he should do, wasn't he?*

A. *Yes.*

Q. *And you were his superior as conductor? He was your brakeman?*

A. *Yes, sir*" (40-41).

After the car reached the side-track the conductor further directed Ring and asked him to go between the defective car and the adjoining car and unhook the chain by which the cars were fastened together.

"Q. And did Ring have anything to do with this draw-bar after you got it into the side-track?

A. After we got on the side-track I was in the rear end of the train and Ring was up by this car that had the draw-bar out and I got out and walked up to a car length from where he was and *I asked him if he could unhook the chain and he said he didn't know*, and he set down his lantern and he tried and he couldn't do it" (35-36).

The statement above quoted is of importance because of the *claim* of the railroad company that the car had come to rest and decedent had *nothing further to do with it*, and it was not in use when on the side-track in question.

In this connection the *purpose of the movement* is of importance.

Conductor O'Leary further testified as to this purpose as follows:

"Q. What was the purpose of unhooking the chain at that time?

A. Because I couldn't take the car in the train further in that condition. *I had to get it out of the train in some way, and that chain had to be unhooked to get it out of the train*" (64-65).

In order to get this defective car *out of the train* in question, it was necessary to uncouple the engine from the front end of the car, run it down past the switch, then down on another track, and through another switch so as to bring it up to the rear of the train.

"I figured on *bringing her to the rear end and head into the caboose*" (65).

It was the intention to move the caboose from the train, *then get the defective car,* and, as Conductor O'Leary testified, "*set it in behind the caboose* and leave it there" (69).

On cross examination by counsel for the railroad company it very clearly appeared that the car in question had not been set at its final resting place but that the movement anticipated was to get the car out of the train and place it at the rear of the caboose.

"Q. Now, I believe you have testified to it, but to make sure I will ask you this question: When you were going in to the chain to unhook it, to which you testified on Mr. Davis' direct examination that was the first thing to be done *in order to get this bad-order car out of the train?*

A. Unhook the chain, yes.

Q. And did you have any other object or

purpose in mind at the time you were doing that?

A. No" (69).

So far as the use of the car is concerned and the claim of the petitioner that it was not in use, Conductor O'Leary further testified:

"Q. And it was *while you were moving this car with the defective draw-bar* that Mr. Ring was injured on the side-track?

A. Yes" (58).

This statement by the conductor may be somewhat misleading, but it is clear that the defective car was *not* at rest, but that while it was to be moved and was to be put to the rear of the train, the injury to decedent occurred.

Having in mind now the movement contemplated and what actually took place, that is, the switching of the entire train to the side-track, the intent to take the engine from the front of the train, bring it to the rear, remove the caboose and then put the defective car at the rear of the train, we come to a consideration of the facts immediately previous to the injury to Ring.

The train had gotten to the side-track. It was standing perfectly still.

The conductor was in charge of the train, and Ring was assisting him. As the conductor testified:

"I asked him if he could unhook the chain, and he said he didn't know" (35-36).

"Q. And then what happened?

A. And I told him to let me try, and I

couldn't unhook it. It was a heavy chain and one man couldn't handle it, and he climbed over the end of the car and got on the other side, so I was on one side of the draw-bar and he was on the other, and he was facing the east and *he reached down to lift up the chain, and the train backed up*" (36-37).

While decedent was between the cars the train backed up without any signal or warning (37). This is an undisputed and uncontroverted fact.

"Q. And no warning was given that the train was coming back?

A. No.

Q. *And you were in charge of the train as conductor?*

A. *Yes, sir.*

Q. And you gave no signal to back up?

A. No.

Q. Had you given any directions to them not to back up until you had unhooked the chain?

A. No" (39).

As O'Leary testified:

"I figured on bringing her to the rear end and head it into the caboose."

By this he meant that the engine was to come to the rear of the train and move the caboose and *then* get the bad-order car (66).

After explaining how this movement would be made this question was asked:

"Q. And *then* what would you have to do *in order to complete this movement,* if anything?" (67.)

This question is significant. *To complete the*

movement. It is clear from this question and the answer which follows that the car *could not have been at rest* and at its destination on a dead track as petitioner's brief would lead the court to believe.

In answer to the question just quoted, O'Leary testified:

> "A. Well here is the caboose here (indicating). We would go up and hook on to it. *In order to get the bad-order car out* you would have to *unhook the chain* that coupled it to the head of the train and *pull it back* and *throw it out on the main line—this bad-order car, I mean*" (68).

At folios 68 and 69, the conductor speaks of the *movement* to be made, the language being in the past tense.

For instance, the question is asked:

> "Q. Then what did you do with the bad-order car?
>
> A. Set it behind the caboose and leave it there" (69).

What the witness meant by the testimony, and it will be apparent to the court from reading the record, was that the *intended movement* was to *take the caboose off the rear of the train* and *then pull the bad-order car out* and *then hook the caboose onto the train* and *set the bad-order car in behind the caboose.*

THE CLAIMED DIRECTION OF THE DECEDENT, RING, TO HIS FELLOW BRAKEMAN, QUIST.

It is very vital to get clearly in mind the facts as to what took place *after* the draw-bar was found to be defective.

The petitioner says, in effect, that the *decedent gave directions to move the train,* and *then* went between the defective car and the adjoining car.

There is nothing in the record to sustain any such claim and any statements to this effect are not only wholly inaccurate but positively incorrect and must be misleading to the court.

The railroad called as a witness the brakeman, Frank Quist (292).

Quist testified that after he learned that the draw-bar had pulled out he talked to decedent Ring:

> "A. And then I says, what happened back there, did we get a draw-bar? Yes.
>
> Q. Who did you say that to?
>
> A. To Ring.
>
> Q. Did Ring answer?
>
> A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear? He says, that remains to be seen, *go ahead and pull him in, and come around with the engine.*
>
> Q. What does that mean?
>
> A. Well, *I took it to mean* that I should go in and *go around with the engine.*
>
> Q. That expression?
>
> A. That means that, to go around about my business, to go up there and get into clear, *and come back.*
>
> Q. *Cut off the engine?*" (297-299.)

Bearing in mind now the movement of the car from the main track to the side-track, it is clear that the *only direction* that Ring could have given was the direction *to take the entire train to the side-track. This was done. During this movement Ring was not injured.*

The train came to a stop on the side-track.

After the train came to a stop on the side-track the brakeman, Quist, does not claim, nor does anyone else, that Ring told him to *move a car.*

The statement above made is of importance and it is a correct statement of the record.

The *impression* might be gained from reading petitioner's brief that Ring gave a direction *to move the engine and the train while he, Ring, was between the cars.* Or it may be concluded from reading petitioner's brief that Ring gave the direction which he must have known would have resulted in the movement of the train and without notifying the engine crew Ring went between the defective car and the adjoining car.

The language just above quoted shows that Quist was to direct the train movement *until the train came to rest on the side-track.*

After the train came to rest on the side-track, there was to be *no further movement of the train until* the engine was *disconnected,* taken down another *side-track* and *brought to the rear of the train.*

Had Ring been between the defective car and the adjoining car, and had the engine come from the head of the train back over the switch and coupled onto the caboose and moved the cars while Ring

was then between them, there might *possibly* be something to petitioner's contention.

It is to be borne in mind, however, that Ring was injured *before* the engine got back to the rear of the caboose.

Ring was not injured by any *movement of the cars* which *he had directed* or *authorized.* The train had come to a stop on the side-track (300).

After it had come to a stop the conductor directed Ring to unhook the chain.

After this, after Quist had received a signal to put the train on the side-track and after the train was on the side-track and was standing still, Ring went in between the defective car and the adjoining car *in response to the order of his superior officer, the conductor* (32, 36, 37).

After the train had come to a *stop* the brakeman, Quist, was to disconnect the engine. He was unable to disconnect the engine by the use of the lifting lever "because the knuckles was tight" (301).

As Quist testified:

> "Q. What did you do when you got there?
> A. I stepped in between and turned the angle-cock preparing to cut the engine off.
> Q. The angle-cock, you mean the air?
> A. That is the air, yes, sir. I thought probably I could get the pin without any slacking up, but I couldn't" (300-301).

When he found that he could not get the engine uncoupled from the train, Quist gave a signal to the engineer to back the train up (302).

He testified that he got the slack and raised the

pin (303); and that he gave the engineer a signal to *go ahead, "and the car started the other way"* (303).

Evidently by this, the witness meant that the rest of the train started in a backward direction after he had given the engineer the signal to go ahead.

Quist was asked the question:

> "Q. The train that you cut off started the other way?"

In answer to this, he said:

> "A. * * * Set the air and stopped the train from going out the other end" (303).

As to this *movement* there is nothing in the record to the effect that decedent, Ring, gave directions for the *movement* which would send the cars backward after they had been *brought to a stop* on the side-track; nor is there any evidence that decedent, Ring, could anticipate that any such movement would occur.

Quist says that he was following the instructions of Ring in cutting the engine off to bring it around to the rear of the train (305).

We have here a train *standing still on a side-track.* Decedent was between the end of the defective car and an adjoining car.

The *only direction* that had been given was *to disconnect an engine from a train, which was standing perfectly still.* There is nothing in the record to justify the inference in petitioner's brief that Ring gave directions to move the train and then

went between the ends of the cars.

Quist did not set the air on the cars until they started to drift (330).

He knew generally about the grade but claims he did not know with exactness as to the degree thereof (328-329).

He did not know any one was between the cars when he cut the engine off (357), and when he did cut the engine off, he did not know whether the air had been set on the cars or not (359).

Neither Conductor O'Leary nor the brakeman, Quist, advised the engineer that they were between the cars at the time in question.

There was, of course, *no reason for them to give such advice* because the cars had come to a standstill on the side-track and the only direction was to *disconnect the engine from a train of cars standing perfectly still.*

Just what caused the train to back up seemed to be a matter of some doubt, whether it was the running out of the slack or the direction given by Quist to back up the engine so he could get the pin.

Ring had been in between the cars for some time before the movement occurred (86).

The engineer, Flower, testified that Quist gave him a signal to slack the train (254). This was so the uncoupling could be made.

> "Q. How far would it be necessary for your engine to move to give the slack to the pin?
>
> A. Oh, I would say *a couple of inches.*
>
> Q. Just *enough to loosen the pin* that was bound because it was coupled up?
>
> A. Yes" (281).

This testimony is of special importance in view of the claim of the petitioner that Ring gave directions as to the *movement of the train.* Ring merely told Quist to have the engine cut off and brought to the rear of the train. So far as any backward movement of the engine is concerned, the engine could have been uncoupled as shown by the testimony of the engineer, Flower, by a movement of *a couple of inches* (281).

Along this same line the brakeman, Quist, testified that he thought he could get the pin, that is, make the uncoupling *without any movement* of the engine.

> "I thought probably I could get the pin without any slacking up" (301).

If Quist thought he could make the uncoupling without a train movement, it must certainly be reasonable to assume that *Ring thought the very same thing*, as did the conductor, O'Leary.

None of the crew had given any instructions regarding the movement of the train which was to be made after O'Leary and Ring were between the defective car and the adjoining car. The direction of Ring to Quist did not contemplate any movement of the cars while he was between them. It was merely an order that an engine be disconnected from a train which was standing still. The engine was *later*, in the contemplated movement, to be connected to the caboose and the defective car pulled out of the train.

SUMMARY OF FACTS.

A freight train pulled into Budd, Iowa, and a draw-bar was found to be defective. It had pulled out of the car.

The car was chained to the adjoining car. The train was pulled to the side-track. Directions were given to *uncouple the engine* from the head of the train, *bring it around on another track* to the rear of the train, *pull off the caboose*, then *pull out the defective car,* and leave it behind the caboose.

While the train was standing still on the side-track, and before the engine was uncoupled and *before the defective car had been taken out of the train and placed to the rear*, as was intended, and before the movement of the defective car had been completed, the brakeman, Ring, at the direction of his superior, went between the ends of the defective car and the adjoining car and attempted to unloosen the chain which held the cars together.

While he was between the ends of the cars a movement thereof occurred, of which he had no warning, and which he had no reason to anticipate. This movement injured him, the injuries subsequently resulting in his death.

Decedent was acting at all times, under the orders of his conductor.

When these facts were presented to the trial court, the trial court submitted the case to the jury, leaving the question of fact for them to determine as to whether or not the coupling appliance was in fact defective.

The trial court also submitted the question of proximate cause to the jury in the following language:

> "Proximate cause of an injury is that which causes it directly or immediately, or through a natural sequence of events, without the intervention of any other independent or efficient cause. The defective coupler may be found to be the proximate cause of decedent's injury if it was a direct and immediate cause without which the injury would not have occurred" (522).

On the question of the rules, the court instructed the jury that the acts of the plaintiff were no defense unless the acts were the *sole cause* of the injury (537).

The jury, the trial court and the Supreme Court of Minnesota found for plaintiff *on all the issues of the case.*

Inaccurate Statements in Petitioner's Brief.

Before we come to the questions of law in this case, we desire to call attention to some of the statements in petitioner's brief which are likely to mislead the court.

On page 3 of the brief of petitioner, it is said:

> "No warning to Ring was called for because the *movement* was made in compliance with Ring's direction to Quist."

From the facts, as heretofore stated, it is apparent that Ring did not give *any direction whatever calling for a movement* of the cars in question.

The direction was to uncouple the engine from a train which was standing still.

As the engineer, Flower, testified (281), so far as uncoupling the engine was concerned, a movement of a couple of inches would be sufficient.

It also appears on page 3 of petitioner's brief:

> "He made no effort to step out from between the cars, although, as the conductor testified, his idea would be to get out of there."

This relates to the *movement* which occurred when Ring was between the ends of the cars. When the *emergency* confronted him, he attempted to save himself by drawing his arm over the axle. He was *not standing up*, as was Conductor O'Leary, and he was not in position to immediately step out from between the cars, as did the conductor.

At the top of page 3 of petitioner's brief, it is said that Ring and O'Leary, without the knowledge of Quist or the engineman, went to the bad-order car to unhook the chain.

It might be inferred from this statement that there was to have been a *movement* of the train while Ring and O'Leary were between the cars, which Ring and O'Leary knew about, or which O'Leary had directed or authorized.

The fact is that the train at the time was *standing still* and there was *no movement contemplated until* the engine was *brought around to the rear of the train*.

A statement is made on page 4 of petitioner's brief that Ring was familiar with the grade at Budd where the accident occurred, but there is no

showing that the grade was of such a character that cars would start in motion when the engine was disconnected from this train, forty cars in length.

It is said on page 4 of petitioner's brief:

> "Ring gave no warning to the engineer that he was going between the cars."

This statement is correct. But there should not be an *inference* from this fact that Ring figured there would be *any movement* of the cars. It is also said on page 4 of petitioner's brief that Ring "went in there of his own accord."

While it is true that this language was used by the conductor, O'Leary, when he was on the stand, this statement, standing alone, conveys a wrong impression, because O'Leary several times stated that Ring was in between the ends of the cars at O'Leary's direction (36-37).

> "Q. *He was working under you?*
> A. *Yes.*
> Q. *And if he went in there to unhook the chain before you moved the train it would be your duty to tell him to get out?*
> A. *Yes, sir.*
> Q. *And he was in there working with you and doing whatever you suggested he should do, wasn't he?*
> A. *Yes*" (41).

Under the heading, "Questions Involved," on page 5 of petitioner's brief, this appears:

> "In carrying out *Ring's directions the movement of the train took place. Ring thus controlled the movement of the train.*"

This is not the fact. In carrying out Ring's di-

rections to uncouple a locomotive engine from a train of forty cars *standing still on a side-track, Ring could not anticipate any movement of these cars.*

> "I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side-track" (34).

This was the movement that took place *before* Ring was killed.

Furthermore, O'Leary testified:

> "I told Ring and the rear brakeman *after* we pulled the train in, we would *switch it out of the train*" (35).

It is not a fact, therefore, that Ring gave *any direction* regarding the *movement* of the train *after* Ring was between the ends of the cars. Both Ring and O'Leary had been between the cars on the side-track for some time before the *movement* due to the uncoupling, occurred.

ARGUMENTS, POINTS AND AUTHORITIES.

Specification of Error III and the subdivisions thereof are to the effect that the facts do not bring the case within the Safety Appliance Act.

On page 10 of petitioner's brief, it is said:

> "The car had come to rest on the side-track and had ceased to be used as contemplated by the act."

THE FEDERAL STATUTE.

Petitioner claims the Safety Appliance Act has no application to the facts as they appear in this case:

Section 2 of the original Safety Appliance Act, approved March 2nd, 1893, is as follows:

> "Sec. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be *hauled* or *used* on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be *uncoupled without the necessity of men going between the ends of the cars.*"

Section 8 of the act does away with the defense of assumption of risk.

By the Amendment of 1910, it was provided that a car subject to the act, if found defective, could be hauled to a repair point, but it was further provided that:

> "Such movement or hauling of such car shall be *at the sole risk of the carrier,* and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe (a) by reason of *or* (b) *in connection with* the *movement* or *hauling* of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by

> means of chains instead of draw-bars, in revenue trains or in association with other cars that are commercially used, unless such defective car contains live stock or 'perishable' freight."

The petitioner is an interstate carrier and decedent was engaged in interstate commerce at the time in question. Does the statute pertaining to couplers and draw-bars apply to the situation found to exist at Budd, Iowa, when decedent was killed?

On the question of the applicability of the statute, counsel claim the case is governed by *McCalmont v. Penn. R. Co.*, 273 Fed. 231, and *Boldt v. Penn. R. Co.*, 245 U. S. 441. Neither decision is in point, as will be pointed out hereafter.

The Supreme Court of Minnesota held the statute was applicable, and held that the car had not yet come to rest but was *in use* within the meaning of the act, saying:

> "1. Do the facts bring this case within the provisions of the Safety Appliance Act? The defendant asserts that nothing happened while this car was chained up and hauled on to the side-track, and that it there came to rest, and that it at that instant ceased to be 'used' by the carrier. It attempts to put this defective car in the status of the car in *McCalmont v. Penn. Ry.*, 273 Fed. 231, affirmed 283 Fed. 736, wherein a car was placed on a dead track where an employe was later injured. In this case the defective car was not yet placed to be left and in fact the equipment, the chain, used to replace the defective coupling, was still intact and the car remained in the train of which it was a part. There was here no break in the

> chain of events between the pulling out of the draw-bar and the injury. * * * Clearly the facts bring this case within the Safety Appliance Act. *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N. W. 922, 239 U. S. 349; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; *Goneau v. M., St. P. & S. S. M. Ry. Co.*, —— Minn. ——, 191 N. W. 279; *Frye v. C. R. I. & P. Ry. Co.*, —— Minn. ——, 195 N. W. 269" (599-601).

That the record sustains the conclusion of the Minnesota court is clear from the statement of facts heretofore made.

If the record does sustain this conclusion of the Minnesota Supreme Court, manifestly there is nothing tenable in the contention of petitioner.

Petitioner insists that the Minnesota Supreme Court is in error in the statement as to what the facts were and as to the conclusion of law which must necessarily follow. This is said to be true because the case is ruled by *Penn. R. Co. v. McCalmont, supra.* The McCalmont case is not in point. There the court was dealing with an entirely different state of facts. In the opinion the court said:

> "The defendant was *not hauling* it or permitting it to be *used* or hauled on its line. It had *taken it out of use* and had placed it on a *dead track*, and the hauling or the *movement* of it * * * was *not in immediate contemplation.*"

It may be conceded that if a defective car should be taken to a side-track and left there and *not used* and *not moved,* and later, when *no movement* of the

car was *in contemplation,* an employe should be injured, the statute might have no application, but it is not necessary to consider that question in the case at bar.

The defective car was *not* placed on a *dead* track. Even under the statement of facts of the petitioner, on page 2 of the brief, it appears that there had to be a *movement* of the cars connected to the bad-order car *before it was* to be taken out of the train.

Under the testimony of the conductor, O'Leary, and this was not disputed or questioned, the *work had not been completed*, the *movement* was *not completed,* and the crew *contemplated* taking the car in question *out of the train.* It was to be *further switched. It had to be moved. It had to be hauled* and was clearly *in use* within the meaning of the statute.

Whether the decision of the McCalmont case be correct or not, whether it involves too narrow a construction of the Safety Appliance Act, is of no moment. *The facts in that case are not similar to the facts in the case at bar.*

In the portion of the decision quoted in petitioner's brief, at the bottom of page 11, it is said that he, the employe in the McCalmont case, was merely *making temporary repairs to the car upon the dead track* so that at some future time it might be moved or hauled.

Counsel on page 12 of this brief then say that *the salient points* in the McCalmont case and the case at bar are the *same.*

Nothing could be further from the fact. This

statement is also made, "*as in that case,* the *car was out of service.*"

There is not *one word* of testimony in the entire record to sustain any claim that this car was *out of service.* The statement is *wholly incorrect* and entirely *without any* support.

The car in question was still in use. It had *not* been *disconnected* from the other cars in the train, which were being commercially used and moved.

The defendant had a right to move the car to the repair track without incurring a penalty, under the express provisions of the statute, but the car was nevertheless *in use,* and in the *movement* when the car was so *in use,* Ring was killed.

Congress, in passing the provision providing for the hauling of the car to a repair track, after it was found to be defective, gave to the carriers all the privileges needed or rights necessary to protect themselves from the penal provisions of the statute.

Congress also by the Amendment of 1910, placed the blame, in a remedial action by the employe, upon the carrier, rather than upon the employe, and said that such movement or hauling of a car *to a repair track should be* "at the sole risk of the carrier."

Was the car in question in use? Had its movement ceased? Was it placed at rest on a dead track?

We have made a most painstaking search of the record to find *anything* therein to justify the claim of petitioner that the car in question had ceased to be *used.*

This claim cannot be justified. *The movement was not over.* The car had to be unchained, the caboose taken from the end of the train, the defective car hauled out, and the caboose then placed at the rear of the train in question.

The attempt to unhook the car was made as testified by Conductor O'Leary, "*in order to get this bad-order car out of the train*" (69).

As to the purpose in unhooking the chain, O'Leary was asked:

> "Q. Did you have *any other object* or *purpose* in mind at the time you were doing that?
> A. No."

This question and answer followed the question above referred to wherein the witness was asked relative to *unhooking the car in order to get the bad-order car out of the train.*

If the car was not in use *when* did it cease to be in use?

The statute would be of no avail as a remedial act for employes, if it could be said that a car was *not in use* the minute it was found to be *defective.*

The defective car caused the death of Ring. Congress intended to protect employes when working *about* such defective cars.

The car must have been *in use* while the train was being *hauled to the side-track,* and after it was chained to the adjoining car.

The *movement of the car was not completed* after it came to the side-track.

It had *not been unhooked* from the adjoining car.

A *further switching movement was contemplated.*

There is nothing to justify any claim that while the conductor and Ring were working about this defective car, it was not in use.

There might possibly be some lack of definiteness in the record as to whether the defective car was to be actually hauled out of Budd or was to remain there.

At folio 69 this appears:

> "Q. Then what did you do with the bad-order car
>
> A. Set it behind the caboose and leave it there."

The tense of the question as well as of the answer might tend to mislead the court.

The intent of the question was, "What were you going to do with the bad-order car?" And then the answer, "Set it in behind the caboose and leave it there."

The record is not clear whether "leave it there," meant to leave it *behind the caboose* and *haul it with the train,* or *leave it* at Budd, but, in any event, there was *still a movement to be made* of the car and it was not at rest and was clearly in use at the time in question.

The case of *Boldt v. Penn. R. Co.,* 245 U. S. 411, cited on page 12 of petitioner's brief, is not in point and will not be of assistance to this court in considering any question there may be in the case at bar.

The right of recovery in that case was *not based upon a claimed violation of the Safety Appliance Act.* It is true there was a repair of a defective

coupler, but it was *not claimed* in that case that this defect had *anything* to do with plaintiff's injury.

As stated by Mr. Justice McReynolds:

> "Plaintiff maintained that the *brakeman* in control *negligently permitted the moving cars to strike with too great violence;* also the company *negligenly failed* to *promulgate* and *enforce adequate rules to* safeguard deceased."

There being *no statutory violation*, assumption of risk was an absolute defense under the federal statute. *The case did not involve the question of the cars being in use within the meaning of the Safety Appliance Act.*

The question of whether the car was in use was not considered by the court, *nor even referred to in the decision.*

A similar contention, although under a different name, was made by the plaintiff in error in *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322.

In that case, instead of claiming that the car was not *in use*, the claim was made that it had been *"withdrawn from interstate commerce,"* and that therefore plaintiff was not entitled to the benefit of the Federal statute.

In the Otos case a car with a defective coupling device was being hauled, under the direction of Otos, who was the foreman in charge of the work, to a side-track for repairs.

The railway company contended that under the law it could not *use* the defective car and *had to*

haul it to the side-track; that in hauling it to the side-track it was *but complying with the statute* and it could not be held liable for the accident which occurred while it, the carrier, was trying to comply with the terms of the Federal law.

It was claimed that when the movement to the side-track started,

> "*The car had been withdrawn from interstate commerce,* and that therefore the Act of March 2nd, 1893 * * * does not apply."

In considering that question, this court, speaking by Mr. Justice Holmes said:

> "*It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress.*"

In the Otos case, the early case of *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, was cited with approval.

In that case it appeared that a freight car loaded with interstate freight *was placed on a side-track in the railway yard at its destination to await simple repairs to the automatic coupler.*

The opinion of this court was written by Mr. Justice Harlan, who quoted the language of the Circuit Court of Appeals as follows:

> "'This is a case *peculiarly within the provisions of the act.* A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order" and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on *moving it about in*

> *connection with other cars,* and finally ordered the injured employe to couple it to another car. This he tried to do with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed.' * * * We concur with the majority of the court below that the car in question *was being used in interstate traffic when the plaintiff was injured.*"

In the Delk case it appeared that the car had come into the yards on *October 2nd,* had been delivered to the Belt Line Company and was returned by that company the next day because of the defective coupler; that on the morning of *October 4th,* while this car was being taken out of a string of nine cars, Delk was injured.

Under the holding in the Delk and Otos cases, as well as the plain terms of the statute, there is no question but that the car was subject to the act. It was still in use. It was not on a dead track. The movement was not complete.

It was in use at the time Ring was injured and the *movement* and *use* of it at the time gave rise to a cause of action under the statute.

It being clear that the car was *in use* within the meaning of the Safety Appliance Act, and that deceased was killed by the *movement* thereof, we pass to the next specification of error claimed by petitioner.

Specifications of Error I, II and IV.

Under this heading, it is said, "*The defective*

draw-bar did not proximately contribute to the injury in this case."

This action was founded on the Employers' Liability Law.

The "negligence" consisted in the violation of the Federal statute. The violation of the statute in and of itself is negligence within the meaning of that term, as used in the Employers' Liability Law.

See *San Antonio & A. P. R. Co.*, 241 U. S. 476, 60 L. Ed. 1110.

Section 1 of the Employers' Liability Law provides, so far as here material:

> "Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of its officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence."

Section 3 provides that contributory negligence shall not be a defense, and substitutes the doctrine of comparative negligence.

We quote from Section 3:

> "Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes *contributed to* the injury or death of such employe."

Section 4 provides:

> "Section 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes *contributed to* the injury or death of such employe."

At the top of page 14 of petitioner's brief, Counsel state:

> "The question of whether a particular act is remote or proximate is purely a *question of law.*"

This statement hardly squares with the fact. The question of proximate cause is essentially a fact question. This has been the holding of this court from the early Kellogg case, 94 U. S. 469, 24 L. Ed. 256, to the present. Citation of authority on the point is not necessary.

In considering whether or not the defect was the cause of the injury to and death of decedent Ring, we must bear in mind that the question of proximate cause was submitted to the jury by the trial court who said:

> "The proximate cause of an injury is that which causes it *directly* or immediately, or *through a natural sequence of events,* without the intervention of any other independent of efficient cause. The defective coupler may be found to be the proximate cause of decedent's injury if it was a direct and immediate cause

without which the injury would not have occurred" (522).

Respondent contends:

1. That the defective appliance was the proximate cause of the death of Ring.

2. That under the Federal statutes the defect need not be the sole proximate cause of an injury or death, but that it is sufficient if such injury or death result "in whole or in part" from the defect, or if the defect be *one* of the proximate or concurring causes.

1. *The defect was the proximate cause of Ring's death.*

In the case of *Great Northern R. Co. v. Otos, supra,* it appeared that Otos went between the ends of moving cars. There was a defective coupler. While between the ends of the cars, his foot caught in an *unguarded frog* and his leg was run over.

The court submitted the case to the jury solely on the question of the violation of the Safety Appliance Act and the question whether or not that was the proximate cause of his injury.

In considering the question of *proximate cause* this court, speaking by Mr. Justice Holmes, said:

> "Under the instructions of the court *the jury must have found that the defect was the proximate cause of the injury as that was made a condition of the plaintiff's right to recover.*"

A consideration of the question of proximate cause in the case at bar brings us, to a degree, back

to a consideration of the question of whether the car was *in use.*

Defendant contends that the car was not in use and that the defect, as an active force, had ceased, "when the car had come *to rest* on the side-track" (page 14, Petitioner's Brief).

Petitioner contends that there were three active forces intervening subsequent to the defective draw-bar:

1. The direction of Ring to the brakeman, Quist.
2. The fact that Ring placed himself between the cars in violation of the rule.
3. Ring's actions in not getting out from between the cars *quickly enough* after they started the backward movement.

In answer to Proposition 1, relative to the directions Ring gave to Quist, nothing more need be said than that, under the facts in the case, *Ring did not give to the brakeman, Quist, any direction to move the cars after he, Ring, was between the ends thereof.*

As the statement of facts shows, the *only* direction that Ring gave to Quist was when Ring, speaking *for his superior officer, the conductor,* told Quist to *disconnect the engine* from the train which was *standing still.* This was all Quist had to do.

Proposition 2, so far as it involves the question of rules, has no application to the situation that existed. This is true because *Ring did not expect or contemplate any movement* of the cars *while he was between the ends thereof.* Furthermore, the

rules would not be admissible *for any purpose* under the many decisions of this court.

We will refer to this later.

As to Proposition 3, regarding *getting out from between the cars,* the act of Ring could *at most be an act of contributory negligence.* If he failed to get out with the alacrity which he should have, his failure could not effect his right of recovery in view of the plain words of the statute doing away with the defense of contributory negligence.

In considering each of the propositions as to proximate cause, we must first *assume that the statute applied to Ring and the situation existing at Budd, Iowa.*

Assuming this, there was a *primary right* of cause of action in favor of Ring's administrator. This being true, any defense of assumption of risk or contributory negligence would be unavailing and any act of decedent contributing toward his injury could not defeat his recovery.

Counsel state that the proximate cause of the death of decedent Ring was not the defective appliance, but the subsequent *movement* of the car.

Such argument has little merit. To answer it we need only revert to the *purpose* of the statute. The purpose of the statute was to require the carrier to maintain its equipment in such condition that an employe *would not need to go between the ends of the cars.*

The duty of the carrier was made *absolute* so that the employe would not need to show failure to inspect, lack of care, or other breaches of the

common law duty devolving on the master.

To say that the *movement* of the car was the *cause* of the injury, and not the defective appliance, is to lose sight of the purpose of the statute.

The *defective draw-bar* did not injure any one. A defective coupler *in and of itself* could rarely be the direct cause of an injury to an employe.

The injury, of necessity, must come from the *movement* of the cars, which follows the act of the employe in going between the ends thereof. It is not the defective appliance *of itself* which causes the injury.

The draw-bar did not run over Ring. The draw-bar did not fall on Ring, but *it was the movement of the car* which was made when he was between the ends of the cars which *brought about, produced* and *occasioned* the injuries resulting in his death.

It would be absurd to say that there could be no recovery because the draw-bar did not fall onto Ring and crush him. It would be equally absurd to hold that a switchman could not recover where he was injured because of a *defective coupler* when he stepped *between the ends of the cars* and attempted the coupling by hand.

In both the cases mentioned neither the *draw-bar* nor the *coupling* device *in and of themselves* caused the injury to the employe.

The injury was caused by the *movement* of the car. The *movement* of the car was a *source of danger* to the employe, because the statute had been violated, and this violation required the employe to be *between the ends* of the cars. It was

the aim of the statute to prevent any occasion of this kind. The statute was designed to protect employes from the likelihood of injury, not from *standing cars,* not from couplers or draw-bars, but from *moving cars,* between which employes were obliged to be because of defective appliances. This contention cannot be refuted. The amendment of 1910 to the Safety Appliance Act, providing that the carrier shall not be relieved from liability "in connection with the movement * * * of such car" shows the congressional intent. Congress intended to give a remedy to employes injured by moving cars which were used contrary to the statute. There can be no other construction of the statute and it cannot be that liability can be avoided under the guise of proximate cause because the coupler or draw-bar did not *itself* injure the employe.

In the case of *Great Northern R. Co. v. Otos,* hereinbefore referred to, the same question of proximate cause was urged upon this court. In the transcript of the record in that case, page 214, assignments of error V and VI are given, which are as follows:

> "V. The said Supreme Court erred in holding that the *proximate cause* of the injury of defendant in error was the defective condition of the coupling apparatus, where it appeared that at the time defendant in error was injured he was engaged in *violating one of the rules* of the plaintiff in error."
>
> "VI. The said Supreme Court erred in holding that the proximate cause of the in-

> jury of defendant in error was due to a violation of the Federal Safety Appliance Act."

In support of both of these assignments of error it was contended that some *intervening cause* or *violation of a rule* or the *catching of plaintiff's foot in the frog* was the proximate cause of his injury.

This court paid little heed to the claim, holding that inasmuch as the question was submitted to the jury, *"the jury must have found the defect was the proximate cause of the injury as that was made a condition of the plaintiff's right to recover."* It could be said in the Otos case, with as much reason as in the case at bar, that the defect was not the proximate cause of the injury, but the proximate cause was the unblocked frog.

To revert now to the question of rules for a moment, the answer of the Supreme Court to the claim that the violation of the rules was the cause of the injury was given in the Otos case as follows:

> "The fact that plaintiff's conduct *contributed* to the result was *not a defense.*"

The court cited with approval *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S. 42, 58 L. Ed. 838, wherein the court said that plaintiff's act, if *one of contributory negligence, could not be called the proximate cause so as to defeat his right of recovery,* when it could *not* be defeated by calling the *same act* contributory negligence.

So far as the question of rules is concerned, if they had *any application to the situation,* which

they do *not,* they, nevertheless, could not be considered for any purpose, because a violation of the rules could at most be *contributory negligence* and this, under the statute, would not constitute a defense.

The record in the Otos case showed that Otos had received and acknowledged receipt of a rule saying that employes should not go between *moving cars* to make a coupling or uncoupling.

Nevertheless Otos did go between the ends of moving cars, and he was injured.

The court held the rule could not defeat his recovery.

It would be an anomaly to say that an employe could go between the ends of *moving* cars in plain violation of a definite rule and still have a right to recovery, but if he went between the ends of cars which were *standing still,* in violation of a vague rule, that this would *bar him from recovery.*

There is no merit in the contention of petitioner regarding the rules. It is to be remembered that decedent did not go between moving cars. The rules had no application to his situation.

Defendant offered in evidence the two rules, one known as Rule No. 707, which appears at folio 267 of the record, and is as follows:

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed,

> before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."

The other rule was known as Rule No. 703 and appears at folio 279 of the record which is as follows:

> "703. Persons accepting service will be deemed to have full knowledge of the dangers and risks incident to the service. They agree to exercise due care in the performance of their duties to prevent accident to themselves or others, and, before using them, to see that the machinery, tools, appliances and materials are in a safe condition to perform the service required."

Rule 707 is to the effect that employes must know that signals to enginemen have been seen, "before placing themselves in a dangerous position."

This rule had no application to the facts in the case at bar because, leaving aside the Federal statute for a moment, the train in question was standing still and there could be *no movement* of the train except upon the direction of the conductor, O'Leary.

In this connection it is to be remembered that whatever directions Ring gave to Quist were given to Quist because O'Leary, the conductor, had directed Ring to give the order to Quist. This order was, as has been before stated, *simply to uncouple the engine from the train of cars which were standing perfectly still.*

This rule, therefore, could have no bearing whatsoever.

As to Rule 703 this is simply a statement that employes will be *careful* in the performance of their work. There is no evidence in this case that decedent did anything that the ordinary employe would not have done when he went between the cars *while they were standing still,* at the command of his superior, the conductor.

Finally, on the question of rules, if it be conceded that the defect was one of the causes which "in whole or in part" produced the injury to and death of decedent, then, even though the violation of the rules also contributed to bring about such result, the petitioner would still be liable.

The case must turn largely on the applicability of the Safety Appliance Act. If the car was in use and its *movement* "in whole or in part" caused Ring's death the questions raised by petitioner are of no importance.

Assuming a *primary* violation of the statute and use of the car, liability must follow. If there be no such primary liability, no *use* or *movement* of the car, then the petitioner would not be liable. This would be because the car was not subject to the act, and not because of any rules, nor because of any doctrine of proximate cause.

The rules are of no consequence. This statement is further borne out by Section 5 of the Employer's Liability Act, which provides:

> "Any contract, rule, regulation or device whatsoever the purport or intent of which

shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

2. *The defect need not be the sole proximate cause. "In whole or in part."*

So much has been said by counsel for petitioner regarding proximate cause that we shall proceed to a consideration of the statute that we may determine therefrom what rule Congress has provided, whether it is essential that the defect be the sole proximate cause.

In Section 1 of the act, it is said that the carrier shall be liable for such "death *resulting in whole or in part* from the negligence" of the carrier.

The words, "*in whole or in part*" were put into the state for a purpose.

Counsel in their brief say that *the statute has not changed the rule of the common law as to proximate cause.*

As to this we take issue with counsel. *The rule as to proximate cause has been changed by the statute.*

Not only in Section 1 are the words, "in whole or in part" used, but in Section 3 of the Employers' Liability Act, it is provided that an employee cannot be held guilty of contributory negligence in any case where the violation of a statute by the carrier *contributed to* the injury or death of such employe.

The same thing is found in Section 4 doing away

with the defense of assumption of risk where a statutory violation *contributed* to the injury or death.

The use of the words, "*contributed to,*" in both Sections 3 and 4 is significant.

Taking these words in conjunction with the words, "in whole or in part," as used in Section 1 of the statute, it is clear that the negligence of the carrier need not be the sole and only proximate cause of the injury in order to enable plaintiff to recover.

This is apparent from the many decisions of this court.

Did the death of Ring result *in whole or in part* from the defective coupling appliance?

Section 1 of the Employers' Liability Act uses the word "resulting" before the words "in whole or in part."

This can mean only that there is a liability on the part of the defendant if the statutory violation is one of the proximate or *producing* or *concurring* causes of the injury.

Did the injury result from the defect in whole or in part?

To say that the defect must be the *sole* and only proximate cause would be to give no effect whatever to the plain wording of the statute.

In the very recent case of *Davis v. Wolfe*, 44 S. C. 64, decided November 12, 1923, this court in an opinion written by Mr. Justice Sanford, had occasion to consider proximate cause and in that case the court said, after referring to many early cases:

"The rule clearly deducible from these four

> cases is that, on the one hand, an employe cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not *a* proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is *a* proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

In the quotation above given, it is to be noted that Mr. Justice Sanford uses the article "a" instead of the article "the," saying that there can be a recovery if the statutory violation is "*a* proximate cause of the accident." It is also said that the statutory violation would not permit a recovery if it did not constitute "*a* proximate cause of the accident." In both instances the article "a" is used.

In addition to this, the case of *Lang v. New York C. R. Co.*, 255 U. S. 455, 65 L. Ed. 729, was quoted, in which it was said that "necessarily there must be *a* causal relation between the fact of delinquency and the fact of injury."

In conclusion, Mr. Justice Sanford said:

> "It results that in the instant case, as there was substantial evidence tending to show that the defective condition of the grab-iron required by Section 4 of the Safety Appliance Act was *a* proximate cause of the accident re-

> sulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to the jury under the act."

It is to be noted that the court used the words, "*a* proximate cause of the accident." Four times in this opinion the article *a* is used in reference to proximate cause.

In the Wolfe case the Supreme Court quoted with approval the Minnesota case of *McNaney v. Chicago, R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650. In that case the Supreme Court of Minnesota said:

> "In the absence of a contrary ruling by the Supreme Court of the United States, construing the Safety Appliance Acts with reference to the proposition here involved, we think it should be held that if the grab-iron was insecure and such insecurity was *the* proximate cause or *one of the proximate causes*, of plaintiff's serious injury, defendant is liable."

Here the court recognized that there could be a recovery if the violation was one of the proximate causes.

The question of proximate cause was considered in *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, *supra*.

In that case the Circuit Court of Appeals, 217 Fed. 524, held that *the statute entirely eliminated the element of proximate cause where there were concurring acts of the employer and employe which contributed to the injury or death of the employe.*

When the case came before the Supreme Court

of the United States, the opinion being written by the late Justice Pitney, reference was made to the position of the Circuit Court of Appeals, and this was said:

> "*We agree with this* except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are *concurring proximate causes*, it is plain that the Employers' Liability Act *requires the former to be disregarded.*"

Under the Employers' Liability Law, in view of the use of the words, "in whole or in part," Congress did not intend that in order for a plaintiff to recover defendant's violation of a statute had to be the *sole and only* proximate cause.

The words, "in whole or in part" would have *no meaning* in the statute if petitioner's position be correct. A construction of the statute which would give to plain words *no meaning* is not to be considered, when the statute can be construed so as to give effect to these plain words and the apparent intent of Congress.

Furthermore from the Campbell case and from the language of Mr. Justice Sanford in the Wolfe case, it is clear that this court, in construing the statute, was of opinion that *there might be more than one proximate cause of an accident.*

The defective safety appliance might be *in part* a cause of the accident, and the act of the decedent, Ring, might be *in part* the cause. If this be true,

a recovery may be had under the act.

In view of the questions raised by petition and their importance to the large body of railway employes governed and protected by the provisions of the Employers' Liability Law and the Safety Appliance Act, we feel that this court should unequivocally make its position plain on a very vital question upon which this court has not decisively spoken as yet.

Much confusion has arisen over the question of proximate cause in actions arising under the Employers' Liability Law, as well as under the provisions of the Safety Appliance Act.

The history of the efforts made to secure the passage of these laws, the consideration of the messages of a large number of Presidents to Congress, urging them to pass legislation of this character; the hearings before the senate and the house committees, clearly show that by the pasasge of these laws, it was the intent and purpose of congress to do away with the harshness of the common law rules relating to liability of the master to an employe.

By the Employers' Liability Law, congress clearly expressed its intention to do away with the Fellow Servant rule.

In cases where there has been a violation of a Safety Appliance Act, Congress denied to the carrier the defenses of assumption of risk and contributory negligence.

It must, therefore, be apparent to the court that the purpose of Congress, as so frequently stated by our courts, was to provide a different mode and

method of recovery than theretofore existed at the common law.

There has been much confusion of thought on the issue of proximate cause, doubtless due to the fact that a distinction has not been clearly made and clearly understood between actions at common law and actions arising either under the provisions of the Employers' Liability Law or the Safety Appliance Act.

When Congress passed the Employers' Liability Law, they used this very significant language—that the employer should be liable for any injury or death "resulting in whole or in part" from the negligence of any of its officers, agents or servants.

This language had an intent and a purpose.

If Congress had intended to *confine the right of recovery* to the old common law doctrine of proximate cause, with all of its metaphysical intricacies and difficulties of application, it could easily have said that the employer would be liable for any injury *"caused by reason of such negligence."*

There was a purpose in using the words, "resulting in whole or in part" and no other purpose can be given these words than that it was the clear *intention of congress* to *modify and ameliorate the harshness of the doctrine of proximate cause* as applied in the various courts of this country and differing, as it necessarily does, with the viewpoint of the judge who tries the case.

This court is well aware of the fact that where a trial judge might hold as a matter of law, that an act *was* or was *not* the proximate cause, that

very frequently the appellate court does not disturb such a finding on the ground as laid down in *Great Northern R. Co. v. Knapp,* 240 U. S. 464, 60 L. Ed. 745 and *Beecroft v. Great Northern R. Co.,* 242 U. S. 18, 61 L. Ed. 530, that it is a matter primarily for the trial court, with which this court will not interfere and unless, as stated in those opinions, "plain and palpable error appears."

Consequently, it is important, and in fact essential, that on this question of proximate cause, or as to the negligence which brings about a condition which "results" in injury, that there should be a *final and uniform determination* for the guidance of the courts, both State and Federal, in this Nation.

If such negligence, or violation of the Safety Appliance Act, brings about a condition which "results" in injury to an employe engaged in interstate commerce, then liability follows as a matter of law.

Otherwise, the words "resulting in whole or in part" are not given their intended or natural meaning.

It must be clearly borne in mind in the discussion of these matters, that different rules of liability apply and are in force, depending upon the determining fact as to whether or not the employe is, or is not engaged in interstate commerce.

In other words, where the employe is engaged in interstate commerce, there is much broader language, as affecting his right to recover, than where he may be engaged in intrastate commerce, but is

entitled to recover because of a violation of some of the Safety Appliance Acts applying to interstate carriers, within the doctrine of *Texas & P. R. Co. v. Rigsby,* 241 U. S. 33, 60 L. Ed. 874, and kindred cases.

To illustrate, a man may be injured while engaged in intrastate commerce, by reason of the violation of the Safety Appliance Law. Under such conditions, certain defenses are available and certain defenses unavailable.

For example, a man *not* engaged in intrastate commerce who is injured by reason of the violation of the Safety Appliance Act upon an interstate railroad, is confronted with the following situation:

First: The company is liable for any defect which is the *proximate cause* of the injury to the employe.

Second: Contributory negligence is an absolute defense.

Third: The defendant is denied for any purpose the defense of assumption of risk by reason of the provisions of Section 8, of the Safety Appliance Act.

Now, then, to show the purpose of Congress, if the same employe is injured while *engaged in interstate* commerce and injured as a "result" of the violation of the Safety Appliance Act, we find the following situation:

First: The defendant is made liable not only for a defect which is the *proximate cause* of the injury, but it is clearly provided under the Employers' Liability Law, that the employer is made liable for any injury *"resulting in whole or in part"* from

the negligence of any of the officers, agents or servants of the employe.

Second: Under such circumstances, the defendant employer cannot avail itself for any purpose of the defenses of contributory negligence, or assumption of risk.

Where an employe is engaged in *intrastate* commerce and is not injured by reason of the violation of a Federal Safety Appliance Act, but because of the negligence of the carrier he must look to the law of the state in which he is injured for recovery and, in some instances, he comes under the provision of a state compensation law, which arbitrarily compels compensation to a limited extent.

In other states, he comes under the provisions of laws similar in import and in effect to the Employers' Liability Law.

When there are no such statutes the employe is left to his common law remedies and all the common law defenses are available to the carrier.

It must be apparent to this court, in view of this situation, that when Congress used the very significant language it did in the Employers' Liability Law, "resulting in whole or in part" that it intended to *modify and limit the harshness of the common law* doctrine of proximate cause.

From the multitude of decisions and the disharmony of the holdings of various courts in confusing the question of "condition" and "proximate cause," it is plain that Congress must have had a *purpose* in using the language it did.

Otherwise, Congress would have used the word

"caused" by reason of the negligence of any of the officers, agents or servants. The very fact that it used different language, clearly indicates a legislative *intent* to apply a *different rule* as to liability, namely, that the employer be liable for any injury *resulting,* or, "which is brought about" by reason of the negligence of any of the employes, officers, agents or servants of the carrier.

To hold otherwise would be to leave to the various courts both State and Federal with different holdings as to what constitutes proximate cause, with a diversity and variety of opinions, the determination of the question of liability under this statute. This must necessarily prevent a uniform application of the provisions of the Employers' Liability Law, which should be uniform over the entire Nation. It cannot be that Congress intended to permit such an uncertain condition to exist. Unless this court definitely and unequivocally passes upon and determines this very vital question of proximate cause it is inevitable that this situation will continue.

This court is well aware of the fact that in different State courts, as well as in different Federal courts, there are various and conflicting holdings as to what may, or may not constitute proximate cause.

The very result obtained by leaving the question of proximate cause to be decided in various jurisdictions in various ways tends to prevent the universal and uniform application of a law which is intended to have uniform application and to give

to an injured employe in one state the same rights, and exactly the same rights, given to such employe in another state.

For instance, if the courts of Minnesota should hold that certain facts raise a question for the jury on the issue of proximate cause and that a certain defect bringing about the injury was not merely a "condition" but *the* proximate cause of an injury, then, the injured employe would have a right to recover.

While on the other hand, if the courts of New York, upon the same state of facts, should hold that the thing which produced the injury was not the proximate cause, but merely created "a condition," then the employe in New York, on the same state of facts, would be denied a recovery.

And this court under the holding in the case of *Great Northern v. Knapp* and *Beecroft v. Great Northern, supra,* would necessarily refuse to review such a holding of the State court.

This is what is continually occurring in the courts of the various states and the Federal courts because there is no authoritative determination of this question and no construction of the language used by Congress in Section 1 of the Employers' Liability Law, namely, "resulting in whole or in part." This very condition impels us to suggest the propriety of this court of passing upon this question, so that there may be uniformity of the holdings thereon.

Not only is there lack of uniformity in the holdings of the different state courts; not only are the

holdings unharmonious and conflicting, but so, also, are the holdings of the Federal courts in the various circuits. This, of itself, is warrant sufficient for this court to finally pass upon this question and pronounce a rule for the guidance of the bench and bar of the country.

If it be held that the words "in whole or in part" are to be given their natural meaning the question will be solved and the confusion ended. Some courts now hold the defect must be the proximate cause, others that it be sufficient if it be *a* or one of the proximate or concurring causes. Some courts are in accord with theory of petitioner, that the common law rule as to proximate cause has not been ameliorated or changed by the statute.

In the case of *Erie R. Co. v. Russell,* 183 Fed. 722, the court held that the violation of the Safety Appliance Act was the thing which *"brought about the result,"* and the holding in that case clearly showed an intention upon the part of the court to give effect to the words "resulting in whole or in part," and yet a reading of the facts will clearly convince this court that in many jurisdictions courts would have held that the claimed violation of the Safety Appliance Act merely created "a condition" which brought about the injury but was *not* the proximate cause thereof.

It is for this reason that the Supreme Court of the United States should authoritatively and finally settle this question, in order that injured employes all over the nation have the same and not different rights of recovery, and in order to give to the pro-

visions of this law universal and uniform application.

Only recently counsel for respondent had occasion to try a case in the State of Michigan, involving a violation of the Federal Safety Appliance Act relating to the train brakes.

The short facts in the case were these: The train brakes failed to work and did not effectively operate on the train and a brakeman, in the performance of his duty, proceeded "to bleed the air," and in doing this work it was necessary for him to walk along by the side of the cars, take a hold of a "bleed cock" and pull the same, thus releasing the air and enabling the train to operate properly.

There was no dispute about the failure of the train brake equipment to work, nor of the necessity of the injured man "bleeding the air."

While this brakeman was in the act of "bleeding the air," and while he had a hold of the bleed cock for the purpose of remedying an admittedly defective condition brought about by a violation of the Safety Appliance Act, he stumbled and fell over an obstruction on the right-of-way and was thrown under the cars and his leg was taken off.

Upon the trial of that case, the defendant railroad company contended that the "proximate cause" of his injury was the fact that he fell over an obstruction on the right-of-way and that the defective condition of the braking equipment, or the fact that he was "bleeding the air" and remedying the defective condition of the brakes, was not "in whole or in part" the "proximate cause" of his accident

and injury and the defendant induced the trial court to take the position, under some of the decisions of the State of Michigan, that the defective brakes merely created "a condition," but were not "in whole or in part" the "proximate cause" of the accident.

This is an extreme case and yet the trial court in Michigan was prepared to sustain the contention of the defendant and deny to plaintiff the right to ever have a jury pass upon the question of whether or not the defective condition of the braking equipment "contributed" to his injury or whether or not his injury "resulted in whole or in part" from the violation of the law.

Then the plaintiff, under the practice in the state of Michigan, the court having indicated what his ruling would be, availed himself of the privilege of dismissing his case, which was then commenced in the Federal Court of Michigan, so that plaintiff might more easily secure a direct ruling by the Supreme Court of the United States on this very important question.

In that case, it was plaintiff's contention that there must be some meaning given to the word "contributed" and to the words "resulting in whole or in part," and of course the only meaning or construction that could possibly be given to these words, would be that the defective air braking system brought about the "result" or in other words, that the injury "resulted in whole or in part" because of the defective braking equipment. Had there been a holding by the Supreme Court of the

United States construing this language, this situation would not have arisen. This is only one of hundreds of cases where the courts, under the guise of a strict construction of proximate cause, deny recovery to the injured employe in one jurisdiction, while under the same state of facts in another jurisdiction, a recovery can be had.

The Safety Appliance Act was amended in 1910, the amendment having heretofore been quoted in this brief.

We wish to once more call attention of the court to the very significant language contained in the amendment, to-wit:

> "Such movement or hauling of such cars shall be at the *sole risk of the carrier* and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe (a) *by reason of;* or (b) *in connection with the movement* or hauling of such car with equipment which is defective, etc."

There are three significant factors to be considered in construing this amendment:

1st: That the movement or hauling shall be *at the sole risk of the carrier.*

2nd: That the carrier shall not be relieved from liability for any injury caused to such employe *by reason of the movement or hauling* of such car.

3rd: That the carrier shall not be relieved from liability for the injury to an employe *"in connection with"* the *movement* or *hauling* of such car.

The words, *"in connection with,"* are significant.

It clearly was the congressional purpose, as appears by this amendment, to make the hauling of a defective car an act at the peril of the carrier, so far as remedial actions of employes were concerned.

And in such actions the employe was to have all the rights given by the statute, even though the car was to be taken to a repair track. If the employe received an injury by reason of the *movement* of that car, or in *connection with* the *movement* thereof his right of action could not be defeated.

This statute, when taken *in connection with* the Employers' Liability Law, wherein it is provided that the carrier shall be liable for an injury resulting *"in whole or in part"* from the negligence of the carrier, and when taken in connection with Sections 3 and 4 of that statute which provide that the defenses of assumption of risk and contributory negligence shall not be available where the violation of a statute by the defendant *"contributed to the injury or death of such employe,"* clearly shows that the common law doctrine of proximate cause *does not have its full force in an action under these statutes.*

Congress would not have used the words in the Amendment of 1910, *"in connection with"* unless there was a purpose in using such language.

Had Congress intended that the common law doctrine of proximate cause should have its full force and effect in actions under the Federal statute, the Amendment of 1910 might well have provided that "nothing in that section would relieve the carrier from liability to an employe for the injury *caused*

by the *hauling* or *movement* of the defective car."

Congress was *not content*, however, *with the common law rule as to proximate cause*, and did not merely make a provision that the injury had to be *caused by* the *movement* or *hauling* of the car, but *specifically said* that the liability would follow for an injury caused to an employe *in connection with* or *by reason of* the movement or hauling of the car.

The words, "in connection with" do not need definition. Neither should they be subject to delimitation of their common meaning.

These plain words should be given the significance Congress intended them to have. Congress intended by the statute that any *movement* of a car which might *bring about an injury* to an employe, either directly or *in connection with*, such movement should give rise to a cause of action.

The use of the language, "in whole or in part," the language, "contributed to," and the language, "in connection with" shows that *the common law rule as to proximate cause has no application to an action under this statute.*

As stated in *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 557, 55 L. Ed. 582:

> "In the case before us *the liability* of the defendant does not grow out of the *common law duty* of master to servant. The congress, *not satisfied with the common law duty and its resulting liability*, has prescribed *the duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words *in which the duty is described*. * * * There is no escape from the meaning of these words. Explanations cannot clarify them, and

> ought not to be employed to confuse them or lessen their significance. The *obvious purpose* of the legislature was to *supplant the qualified duty of the common law* with an absolute duty deemed by it more must. * * * Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek *some unnatural interpretation of common words.*"

In line with the case just cited, the conclusion is inescapable, that it is not essential in order that there be a recovery where the Safety Appliance Act is violated, that such violation constitutes the *sole* and *only* proximate cause of the injury. *It is sufficient if it be one of the proximate causes,* if it be *a contributing cause,* if it *contribute in whole or in part.* The employe is entitled to recover, where the defect pertains to a car, for any injury arising out of or "in *connection with the movement* of such car."

Much is made by counsel for petitioner of the fact, or the claim, that the defective car was but the *occasion* of decedent being where he was, and not the cause proximately producing the injury.

The word "cause" is defined in Funk & Wagnall's New Standard Dictionary, "to be the cause or occasion of, produce, effect, *bring to pass.*"

The same authority defines the word "contribute" as *"to have a share in effecting a result."*

The word "occasion" is defined as "to cause or bring about by furnishing the condition or occasion needed for an action of a principal cause."

The definitions of the plain words used in the

various sections of the statute referred to, coupled with a common sense construction of these statutes, show that it was intended that *any* injury occurring to an employe in *connection with* the movement of a defective car, or occasioned by the movement of such defective car, "in whole or in part," would give rise to a right of recovery.

The movement of the car caused Ring's death. It cannot be said his death was not caused by or *in connection with* such movement of the defective car.

Did the defective car "in whole or in part" cause Ring's death? The question answers itself!

The other assignments of error are not of sufficient moment to justify argument.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.